

October 21, 2022

Federal Maritime Commission
Attention: Docket No. 22-04
Secretary William Cody
800 North Capitol Street, N.W.
Washington, DC 20573
via email: secretary@fmc.gov

The National Association of Chemical Distributors (NACD) submits the following comments in response to the Federal Maritime Commission (FMC) Advance Notice of Proposed Rulemaking regarding **Docket No. 22-24, Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier**, published in the *Federal Register* September 21, 2022.

About NACD

The National Association of Chemical Distributors (NACD), established in 1971, is an international association of chemical distributors and their supply-chain partners. Member companies process, formulate, blend, re-package, warehouse, market, and transport chemical products for over 750,000 customers across the U.S. The industry NACD represents is a major economic engine that generates \$7.5 billion in tax revenue.

NACD's members represent more than 85% of the chemical distribution capacity in the nation and generate 90% of the industry's gross revenue. They range from small family-owned businesses to large national and international organizations. NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association's third-party-verified environmental, health, safety, and security program. Through this verification, NACD members demonstrate their commitment to continuous improvement in every phase of chemical storage, handling, transportation, and disposal operations.

Ocean shipping is critical to the chemical distribution industry. In 2021, there were 169,257 twenty-foot equivalent units of chemicals received in the ten busiest U.S. ports alone. These chemicals include chlorine, citric acid, and others that are crucial to the American economy, infrastructure, and public safety, but not always readily available within the U.S. NACD appreciates the opportunity to provide comments on the definition of unreasonable refusal to deal or negotiate regarding vessel space accommodations. This rulemaking will ensure the ocean shipping marketplace is functioning in a fair manner that benefits the American economy and well-being of its citizens.



Need for Rulemaking

The Ocean Shipping Reform Act of 2022 (OSRA) stipulates that ocean common carriers are prohibited from unreasonably refusing to negotiate or deal regarding vessel space. The law also requires the FMC to promulgate this rulemaking to define the elements comprising a violation and how the agency will evaluate “reasonableness.” NACD applauds Congress for passing OSRA and the FMC for moving forward with this rulemaking as it is necessary in ensuring a healthy and well-balanced ocean shipping marketplace for American businesses and consumers.

Dating back to before the COVID-19 pandemic, NACD members have had difficulties in securing vessel space accommodations from ocean common carriers. With members shipping chemicals, ocean common carriers have often prioritized the shipment of other products that take up less space, have fewer safety concerns, and are more profitable. This issue has been significantly exacerbated by the COVID-19 pandemic. As demand rose sharply, carriers gave preferential treatment towards less risky commodities with higher profit margins.

This proposed rulemaking is absolutely necessary to ensure that shippers, especially those whose products the ocean carriers consider to be less desirable, are operating on a level playing field. Despite the necessity of the chemicals NACD members import, it has been difficult to reliably acquire vessel space. A survey of NACD members conducted in June 2022 found that a clear majority of members, 61.5%, were out of stock on imported products. A driving factor in this shortage was the difficulties NACD members faced in acquiring vessel space accommodations. The economy, public, and small businesses all rely on these overseas shipments of chemicals which are critical to public health, manufacturing, infrastructure, and other important end uses.

Unreasonable Refusal Definition

In the proposed rule, the FMC outlines how it interprets the definition of “unreasonable” and “refusal” in regard to vessel space, stipulating that these definitions will be considered on a case-by-case basis for each complaint. NACD agrees with the FMC that these definitions ought to be considered based on individual cases and not rigidly applied to every investigation or complaint. There are often nuances and specifics that are unique to each case presented before the FMC, and they deserve to be carefully reviewed by the Bureau of Enforcement, Investigations, and Compliance (BEIC) or adjudicated.

In the proposal, an ocean common carrier who fails to deal or negotiate as to vessel space is considered to be acting reasonably when its actions are connected to a legitimate business decision or motivated by legitimate transportation factors. Examples of legitimate transportation factors include the character of cargo, vessel safety and stability, operational schedules, and adequacy of facilities. NACD agrees with this definition to the extent that ocean carriers can demonstrate a valid and specific safety or operational reason for refusing to negotiate or deal with regard to vessel space accommodations. However, NACD is concerned that ocean common carriers can merely cite the hazardous character of cargo or general vessel safety/stability as a cause for refusal. This definition appears to allow for carriers to justify the refusal to move any chemical by claiming the character of the cargo is more dangerous than other goods and/or impacts vessel safety or stability, even though the



commodities are tendered in accordance with hazardous materials and dangerous goods laws and the carriers have transported such chemicals safely for many decades. This result would be contrary to ocean carriers' status as "common carriers." Allowing vessel space refusals for chemical shipments based only on the hazardous nature of the cargo without a demonstrated and valid safety or operational concern could lead to severe adverse effects on the chemical industry, its supply chains, and other end users who depend on these commodities.

NACD recommends that the FMC clarify its proposed definition of "legitimate transportation factors" to avoid this potential outcome. Rather than defining this term by referencing broad and ambiguous categories such as "character of cargo," "vessel safety and security," "scheduling considerations," etc., we recommend that the only transportation factors that could justify a refusal to deal or negotiate are those that, *at the time the vessel booking is requested*, would create an undue safety risk to the vessel, its crew, or other cargo; would disrupt current operating schedules; or require new facilities to handle the shipment.

This approach would provide greater clarity to the industry as to the boundaries of the types of considerations that may result in a valid refusal to deal or negotiate vessel space as opposed to the very broad and ambiguous definition proposed by the Commission.

Also, when acknowledging what may be considered a legitimate business decision, the FMC specifies that profitability and compatibility with business development strategy may be taken into account when granting contracts. While NACD believes that all players in ocean shipping have a right to pursue what is best for their business and that financial success for all parties contributes to a thriving ocean shipping environment, we are concerned that this definition would allow for ocean common carriers to discriminate against NACD members. While a carrier may reasonably decline negotiating with a shipper when they do not service the shipping lane requested, it is a part of their responsibility as a common carrier to serve the shipping public and they have a responsibility to make the services they offer available within a reasonable timeframe to all who request it, regardless of their cargo, if they are requesting inland shipments, etc. As written, it appears that ocean common carriers would be able to refuse to negotiate or deal with companies shipping chemical products, heavier products, or requesting inland shipments by claiming that it is less profitable or that their business development strategy prioritizes other goods. This result would be contrary to the FMC's long-standing principle that the "primary objective of the shipping laws administered by the FMC is to protect the shipping industry's customers not members of the industry."¹

Further, in OSRA 2022, Congress acknowledged and adopted specific actions to address potential discrimination against hazardous chemical shipments by requiring a review "of whether there have been any systemic decision by ocean common carriers to discriminate against maritime transportation of qualified hazardous materials by unreasonably denying vessel space accommodations, equipment, or other instrumentalities needed to transport such materials."² Thus, NACD recommends that the FMC not include increasing ocean carrier profits or following a business development plan as a legitimate business decision that would justify refusing to accept valid cargo bookings. Indeed, taken to its extreme, such an

¹ *New York Shipping Ass'n Inc. v. Fed. Maritime Commission*, 854 F.2d 1338, 1374 (D.C. Cir. 1988).

² See OSRA 2022, Sec. 22, *Review of Potential Discrimination Against Transportation of Qualified Hazardous Materials*.



approach could justify discriminatory conduct in vessel space allocations by sanctioning ocean common carrier actions to accept only the most highly profitable cargo.

Complaint Process

Beyond defining what may be considered an unreasonable refusal to deal or negotiate with regard to vessel space accommodations, the proposal also outlines the complaint process. In this process once the complainant satisfies the three elements composing a violation, the FMC shifts the burden of proving whether a refusal was unreasonable from the complainant to the ocean common carrier. NACD strongly agrees with this approach as it takes into account that the ocean carrier has more access to relevant information, such as space on their vessels, other bookings on their vessels, their business practices, safety considerations, and other operating details. It is not practical for shippers to provide the data related to whether an ocean common carrier acted in response to a legitimate business decision or a legitimate transportation factor. The ocean common carriers are the ones making these decisions and have the information that was used to make booking determinations. This change is necessary, and NACD commends the FMC for making this update to the complaint process.

The proposal also includes a method for ocean common carriers to justify a refusal through certification. This certification would allow an appropriate and preferably U.S.-based representative of the ocean carrier to attest to the legitimacy of the carrier's refusal to provide vessel space and that its supporting evidence is correct and complete. While NACD is not opposed to allowing carriers to provide an optional certification in support of its decision-making, NACD is concerned that a certification not be given undue weight by the FMC in determining reasonableness. In other words, a certification by the carrier that its own decisions were justified and its furnished evidence is correct is no substitute for an independent evaluation of the specific facts, documents, records, and impacts of the carrier's refusal. Rather, NACD recommends that ocean common carriers be required to justify their refusals to deal or negotiate as to vessel space through the presentation of clear and convincing evidence that establishes a valid and existing safety or operational concern that was present at the time of the booking requests.

Conclusion

NACD appreciates the opportunity to provide input as the FMC moves forward with defining unreasonable refusal to deal or negotiate in regard to vessel space accommodations. With crucial chemicals such as chlorine, citric acid, and others not manufactured domestically in quantities that meet our country's need, the U.S. relies on reliable ocean shipping. Improving the fair movement of goods throughout the ocean shipping landscape is crucial in ensuring a strong American economy and supporting the public well-being. NACD applauds the FMC for promulgating this rulemaking and looks forward to a final rule.



Sincerely,



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